

State of Michigan
In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNESTO EVARISTO URIBE,

Defendant-Appellant.

Supreme Court No. 151899

Court of Appeals No. 321012

Trial Court No. 13-020404-FC

Brent E. Morton (P58526)

Sr. Assistant Prosecuting Attorney

Ann M. Prater (P64660)

Attorneys for Defendant-Appellant

Plaintiff-Appellee's Supplemental MOAA Brief

ORAL ARGUMENT REQUESTED

Submitted By:

DOUGLAS R. LLOYD (P47218)

PROSECUTING ATTORNEY

BRENT E. MORTON (P58526)

Sr. Assistant Prosecuting Attorney

1045 Independence Boulevard

Charlotte, MI 48813

(517) 543-4801

Table of Contents

Index of Authorities	i
Counter-Statement of Basis of Jurisdiction	ii
Counter-Statement of Questions Presented	ii
Introduction.....	1
Counter-Statement of Facts	1
MCL 768.27a-Evidence	1
Appeal.....	2
Law and Argument	3
Issue I	
<p>MCL 768.27a permits the admission of testimony, of other sexual acts committed against children, to show propensity. Admission is subject to review under MRE 403, but not MRE 404(b). <i>People v Watkins</i> requires the propensity of the defendant, to commit child-sexual abuse, be weighed in support of admission; and the facts as a whole be considered, when conducting an MRE 403 analysis. Since credibility of a witness is to be determined by a jury, the trial judge may not exclude evidence based on her credibility assessment. Judge Cunningham excluded MCL 768.27a-testimony based on an incomplete <i>Watkins</i>’ analysis, a credibility determination of JU that “nothing happened,” and an application of MRE 404(b). Did Judge Cunningham abuse her discretion in excluding JU’s testimony?</p>	3
Counter-Statement of Standard of Review	3
<i>People v Watkins</i>.....	3
Judge Cunningham’s Incomplete <i>Watkins</i> Analysis.....	4
Dissimilarity.....	4
Temporal Proximity/Presence of Intervening Acts.....	5

Infrequency	6
Lack of Reliability.....	6
Lack of Need for Evidence	7
<i>Watkins</i> ’-Factors Conclusion.....	8
Cunningham Applied Wrong Standard.....	8
Abuse of Discretion	8
Conclusion.....	9
Cunningham Conducted MRE 404(b) Analysis	9
<i>People v Wilkins</i>	10
Conclusion.....	10
Conclusion.....	11
Issue II	
<i>People v Watkins</i> clarifies that MCL 768.27a-evidence is not subject to exclusion under MRE 404(b). Judge Cunningham excluded JU’s testimony based on an MRE 404(b) similarity assessment, and a credibility assessment of JU based on an initial denial of abuse. Judges Saad, Owens, and Kelly ruled that Judge Cunningham’s denial was an abuse of discretion. Did the Judges err in reversing Judge Cunningham’s ruling?	11
Counter-Statement of Standard of Review	11
Published Opinion.....	12
Credibility Determination	12
Conclusion.....	13
JU Described a “Listed Offense”	13
Conclusion.....	15

Judge Cunningham Improperly Applied MRE 404(b)	16
Conclusion	16
Need for Clarification	16
Conclusion	18
Conclusion	18
Exhibit A	Lansing Police Report, Incident No. LLA12092501164, September 25, 2012
Exhibit B	Michigan State Police Original Incident Report No. 011- 0004428-13, October 23, 2013
Exhibit C	<i>People v Summers</i> , unpublished opinion per curiam, of the Court of Appeals, issued June 18, 2105, (Docket No. 320839)
Exhibit D	<i>People v Quick</i> , unpublished opinion per curiam of the Court of Appeals, issued November 27, 2012 (Docket No. 306030)
Exhibit E	<i>People v Fathi</i> , unpublished opinion per curiam of the Court of Appeals, issued July 20, 2010 (Docket No. 288330)

Index of Authorities

Cases

<i>In re VG, AG, MU, JU, Minors</i> , Eaton County Probate Court Case No. 12-08418-NA)	5
<i>Lewis v LeGrow</i> , 258 Mich App 175; 670 NW2d 675 (2003)	8
<i>People v Babcock</i> , 469 Mich 247; 666 NW2d 231 (2003)	3
<i>People v Blackston</i> , 481 Mich 451; 751 NW2d 408 (2008).....	3, 11, 16
<i>People v Duenaz</i> , 306 Mich App 85; 854 NW2d 531 (2014).....	5, 6
<i>People v Fathi</i> , unpublished opinion per curiam of the Court of Appeals, issued July 20, 2010 (Docket No. 288330).....	17
<i>People v Fathi</i> , 492 Mich 863; 819 NW2d 889 (2012).....	17
<i>People v Furman</i> , 158 Mich App 302; 404 NW2d 246 (1987).....	3, 11
<i>People v Golochowicz</i> , 413 Mich 298; 319 NW2d 518 (1982).....	10
<i>People v Kanaan</i> , 278 Mich App 594; 751 NW2d 57 (2008)	7, 12
<i>People v King</i> , 297 Mich App 465; 824 NW2d 258 (2012)	7
<i>People v Lahyer</i> , 464 Mich 756; 631 NW2d 281 (2001)	7
<i>People v Mills</i> , 450 Mich 61; 537 NW2d 909 (1995)	8
<i>People v Quick</i> , unpublished opinion per curiam of the Court of Appeals, issued November 27, 2012 (Docket No. 306030).....	17
<i>People v Quick</i> , 493 Mich 970; 829 NW2d 200 (2013)	17
<i>People v Summers</i> , unpublished opinion per curiam, of the Court of Appeals, issued June 18, 2105, (Docket No. 320839).....	6
<i>People v Tate</i> , 244 Mich App 553; 624 NW2d 524 (2001).....	3, 11
<i>People v Uribe</i> , unpublished order of the Michigan Supreme Court, entered October 9, 2015 (Docket No. 151899).....	1

<i>People v Uribe</i> , ___ Mich App ___; ___ NW2d ___ (2015)	1, 2, 12, 13, 16, 17
<i>People v Watkins</i> , 491 Mich 450; 818 NW2d 296 (2012)	1, 3-9, 11, 12, 17, 18
<i>People v Wilkins</i> , 82 Mich App 260; 266 NW2d 781 (1978).....	10
<i>People v Wolfe</i> , 440 Mich 508; 489 NW2d 748 (1992).....	7, 12
<i>United States v Guardia</i> , 135 F3d 1326, 1331 (CA 10, 1998)	4
<i>United States v LeMay</i> , 260 F3d 1018, 1032 (CA 9, 2001)	4

Compiled Laws, and Court Rules

MCL 28.722.....	13, 15
MCL 750.520a.....	14
MCL 750.520c	14, 15
MCL 768.27a.....	1-4, 6, 8, 9, 11, 13, 16-18
MRE 403.....	3, 8, 9, 10, 12, 16-18
MRE 404(b)	3, 9-11, 16-18

Counter-Statement of Basis of Jurisdiction

Plaintiff-Appellee does not dispute that the Michigan Supreme Court has jurisdiction.

Counter-Statement of Questions Presented

[W]hether the Eaton Circuit Court abused its discretion in denying the admission of testimony offered under MCL 768.27a and whether the Court of Appeals properly applied *People v Watkins*, 491 Mich 450 (2012), in reversing the circuit court. *People v Uribe*, unpublished order of the Michigan Supreme Court, entered October 9, 2015 (Docket No. 151899).

Issue I

MCL 768.27a permits the admission of testimony, of other sexual acts committed against children, to show propensity. Admission is subject to review under MRE 403, but not MRE 404(b). *People v Watkins* requires the propensity of the defendant, to commit child-sexual abuse, be weighed in support of admission; and the facts as a whole be considered, when conducting an MRE 403 analysis. Since credibility of a witness is to be determined by a jury, the trial judge may not exclude evidence based on her credibility assessment. Judge Cunningham excluded MCL 768.27a-testimony based on an incomplete *Watkins*' analysis, a credibility determination of JU that "nothing happened," and an application of MRE 404(b). Did Judge Cunningham abuse her discretion in excluding JU's testimony?

Defendant-Appellant Answer: "No."

Plaintiff-Appellee Answer: "Yes."

Issue II

People v Watkins clarifies that MCL 768.27a-evidence is not subject to exclusion under MRE 404(b). Judge Cunningham excluded JU's testimony based on an MRE 404(b) similarity assessment, and a credibility assessment of JU based on an initial denial of abuse. Judges Saad, Owens, and Kelly ruled that Judge Cunningham's denial was an abuse of discretion. Did the Judges err in reversing Judge Cunningham's ruling?

Defendant-Appellant Answer: "Yes."

Plaintiff-Appellee Answer: "No."

[W]hether the Eaton Circuit Court abused its discretion in denying the admission of testimony offered under MCL 768.27a and whether the Court of Appeals properly applied *People v Watkins*, 491 Mich 450 (2012), in reversing the circuit court.¹

Introduction

This case involves the challenged evidentiary ruling of Judge Janice Cunningham, excluding MCL 768.27a-testimony describing the sexual molestation of a child by Ernesto Uribe. This sexual assault occurred after Uribe was no longer living with the first child-victim, and describing less egregious acts.

A month prior to Uribe’s trial, the People indicated they would be introducing MCL 768.27a-evidence. Following a hearing challenging the evidence, Judge Cunningham denied admission because she did not believe the witness was credible; and the dissimilarity of the sexual acts, “tip[ped] the scale towards the defendant’s issue of it being prejudicial.”²

On interlocutory appeal, Judges William Saad, Donald Owens, and Kirsten Kelly, unanimously reversed Judge Cunningham’s ruling – ordering her to admit the testimony at trial.³

This case is before this Court on a grant of a mini oral argument.

Counter-Statement of Facts

MCL 768.27a-Evidence

Prior to the commencement of Ernesto Uribe’s trial, on five counts of CSC 1st, Assistant Prosecutor Adrienne Van Langevelde sought to introduce testimony,

¹ *People v Uribe*, unpublished order of the Michigan Supreme Court, entered October 9, 2015 (Docket No. 151899).

² Motions Transcript, March 21, 2014, at 19, and 21.

³ *People v Uribe*, ___ Mich App ___, ___NW2d ___ (2015).

under MCL 768.27a, that Uribe had sexually molested another minor child, JU, after Uribe no longer lived with the victim, VG, who he repeatedly anally-raped.

After hearing oral arguments from Van Langevelde, and Uribe's attorney, Daniel Pawluk, Judge Cunningham ruled that the testimony would not be admissible. Judge Cunningham's decision was based on her belief that "nothing happened;" and that the dissimilarity of the sexual acts, "tip[ped] the scale towards the defendant's issue of it being prejudicial."⁴ Judge Cunningham went on to explain what she believed to be the purpose of MCL 768.27a.

I think the purpose of this legislation honestly is to allow in other allegations that are more similar in nature to show a propensity; see, this is what the defendant does, this is what the defendant does.⁵

Appeal

In response to this denial of evidence, The People filed an interlocutory appeal. Judges William Saad, Donald Owens, and Kirsten Kelly, unanimously reversed Judge Cunningham's ruling – ordering her to allow JU's testimony at trial.⁶ The judges determined that Judge Cunningham committed three errors warranting reversal – first, she improperly made a credibility determination of JU; second, she incorrectly ruled that the allegations were not of a "listed offense;" and third, she applied the wrong standard when assessing admissibility under MRE 403.

⁴ Motions Transcript, at 19, and 21.

⁵ *Id.*, at 21-22.

⁶ *Uribe*, *supra* 3.

Law and Argument

Issue I

MCL 768.27a permits the admission of testimony, of other sexual acts committed against children, to show propensity. Admission is subject to review under MRE 403, but not MRE 404(b). *People v Watkins* requires the propensity of the defendant, to commit child-sexual abuse, be weighed in support of admission; and the facts as a whole be considered, when conducting an MRE 403 analysis. Since credibility of a witness is to be determined by a jury, the trial judge may not exclude evidence based on her credibility assessment. Judge Cunningham excluded MCL 768.27a-testimony based on an incomplete *Watkins*' analysis, a credibility determination of JU that "nothing happened," and an application of MRE 404(b). Did Judge Cunningham abuse her discretion in excluding JU's testimony?

Prosecutor's answer: "Yes."

Counter-Statement of Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion.⁷ An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made."⁸

*People v Watkins*⁹

In *People v Watkins*, this Court determined that the admission of MCL 768.27a-evidence was not restricted by MRE 404(b), but was still subject to the balancing test of MRE 403. Because of the purpose of this statute, any propensity for the defendant to commit a sexual assault on a child is weighed in favor of

⁷ *People v Furman*, 158 Mich App 302, 326; 404 NW2d 246 (1987); *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008).

⁸ *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁹ *People v Watkins*, 491 Mich 450; 818 NW2d 296 (2012).

admissibility.¹⁰

In defining the nature of the balancing test, this Court established six factors for consideration.

(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.¹¹

While this list is not exhaustive, it is inherent in any balancing test that all designated factors be considered and weighed. Judge Cunningham abused her discretion by not considering all factors in making her determination to exclude JU's testimony. As directed in *Watkins*, admissibility determination of MCL 768.27a-evidence requires a consideration of the evidence "as a whole" – not merely the parts that support the judge's desired conclusion.¹²

Judge Cunningham's Incomplete *Watkins* Analysis

In denying the admission of JU's testimony, Judge Cunningham considered only 3 of the 6 *Watkins*' factors. And those factors were not properly analyzed.

Dissimilarity

In considering the dissimilarity of the incidents, Judge Cunningham relied heavily on the dissimilarity of the sexual acts, not the incidents as a whole. Although Uribe repeatedly anally-raped VG, while he only attempted to molest JU,

¹⁰ *Watkins*, *supra* 9, at 496.

¹¹ *Id.*, at 487; citing *United States v LeMay*, 260 F3d 1018, 1032 (CA 9, 2001); *United States v Guardia*, 135 F3d 1326, 1331 (CA 10, 1998).

¹² *Watkins*, *supra* 9, at 489.

it was an abuse of discretion to rely so heavily on the differences in the sexual acts.

In contrast, similarities of these incidents include:

- Uribe was a father figure over both VG, and JU, during the time of the sexual abuse;
- Both VG, and JU, were sleeping, and woke to Uribe molesting them; and
- The girls were close-in-age at the time of the sexual abuse – 9- and 10-years old.¹³

Temporal Proximity/Presence of Intervening Acts

JU's abuse happened after Uribe was no longer living with VG, and available for sexual abuse. Uribe abused VG from 2004 to 2008. The abuse ended when Uribe left VG's mother, in 2008.¹⁴ The attempted molestation of JU happened in 2011, prior to when VG disclosed Uribe's abuse.¹⁵

JU's only incident of molestation, occurring in 2011, is close-in-time but not on-going, because Uribe's parental rights were terminated as a result of an abuse and neglect case that began in November of 2012.¹⁶ In light of the frequency, and length of VG's abuse – 4 years – and the timing of the beginning of the intervening termination proceedings; the abuse of VG, and molestation of JU, are sufficiently

¹³ Lansing Police Report, Incident No. LLA12092501164, September 25, 2012, at 3; Exhibit A; Motions Transcript, at 16-18; People's Reply to Defendant's Objection and Motion to Suppress, dated March 18, 2014.

¹⁴ Lansing Police Report, Incident No. LLA12092501164, at 3-2; Motions Transcript, at 16-18; People's Reply to Defendant's Objection and Motion to Suppress.

¹⁵ Michigan State Police Original Incident Report No. 011-0004428-13, October 23, 2013, at 4; Exhibit B; attachment to People's Notice Pursuant to MCL 768.27a; and Exhibit C to Plaintiff-Appellant's Brief on Appeal, Court of Appeals, dated October 24, 2014.

¹⁶ *In re VG, AG, MU, JU, Minors*, Eaton County Probate Court Case No. 12-08418-NA, petition filed November 28, 2012; *see also People v Duenaz*, 306 Mich App 85, 100-101; 854 NW2d 531 (2014) in which the Court determined that a 2-year span of time between the charged incident and an MCL 768.27a incident was not "too far removed temporally from the instant offenses in Michigan." *Id.*, at 101.

recent, relevant, and close-in-time, to support admission.

Infrequency

Judge Cunningham relied upon the fact that JU was not repeatedly sexually abused, but instead only had to endure one long night of attempted molestation, which was avoided by her response to Uribe's actions. Reliance on the infrequency factor was improper because Judge Cunningham ignored the reason for the infrequency – the presence of the intervening act of Uribe no longer living with, and having influence over, VG; and the termination of parental rights over JU. Due to the intervening act, this factor is neutral.

Lack of Reliability

The lack of the reliability of evidence supporting the occurrences of the other act, is not an excuse for a judge to make a credibility assessment. Rather, it's intended to foster an analysis of corroborating evidence, to determine whether the MCL 768.27a-incident could have occurred.¹⁷ In analyzing corroborating evidence, the Court of Appeals has determined MCL 768.27a-evidence admissible when there is a lack of evidence challenging the reliability of the proffered statement.¹⁸ This factor requires the trial court to look at tangible information, to aid in determining if the evidence is reliable – not the witness' credibility. The trial judge is not permitted to make a credibility assessment, or determine the weight of evidence.

¹⁷ *People v Duenaz*, *supra* 16, at 101.

¹⁸ *People v Summers*, unpublished opinion per curiam, of the Court of Appeals, issued June 18, 2105, (Docket No. 320839) Slip op at 2; Exhibit C.

That is a function left to the jury.¹⁹

However, Judge Cunningham made a credibility determination of JU – deciding that she was lying about Uribe’s molestation. And she did so without the benefit of JU’s in-person testimony. Rather, Judge Cunningham based her assessment on the information that, prior to Uribe’s parental rights being terminated, JU initially denied any sexual molestation by Uribe. Because of a delay in reporting, Judge Cunningham inappropriately decided that JU’s description of abuse lacked “reliability,” or “credibility.”

JU’s disclosure was consistent with the timeline of events, and occurred after Uribe ceased to have contact. Further, there was no evidence that diminished the credibility, or possibility, of the described abuse. With no evidence contradicting JU’s statements, the reliability of the testimony is not challenged, and the factor should have been considered to support admissibility.

Lack of Need for Evidence

This factor was not challenged. This trial will weigh heavily on a credibility competition between Uribe, and VG. Since the juries’ credibility assessment will be essential to making a final determination, this propensity evidence is highly relevant, and necessary.²⁰ Although this factor was not considered by Judge Cunningham, it weighs heavily in support of admission with the *Watkins*’ mandate that the propensity nature of the testimony is to be weighed in support of

¹⁹ *People v Kanaan*, 278 Mich App 594, 618-619; 751 NW2d 57 (2008); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

²⁰ *People v King*, 297 Mich App 465, 476; 824 NW2d 258 (2012); citing *People v Lahyer*, 464 Mich 756, 765; 631 NW2d 281 (2001).

admissibility.²¹

***Watkins*-Factors Conclusion**

Properly considering all the factors, taken as a whole, with the propensity nature of the evidence on the side of admission; the balance is heavily leaning in support of admission. Judge Cunningham's failure to consider all the *Watkins*' factors, and the facts as a whole, was an abuse of discretion.

Cunningham Applied Wrong Standard

As explained in *Watkins*, MCL 768.27a evidence is subject to limitation by MRE 403. MRE 403 permits the exclusion of relevant, admissible, evidence when the "probative value is **substantially** outweighed by the danger of unfair prejudice . . ."²² This does not empower the trial judge to exclude merely "damaging," or "prejudicial" evidence – relevant evidence is inherently prejudicial.²³ Rather it permits a judge to exclude "unfairly prejudicial" evidence.²⁴ However, when considering MCL 768.27a-testimony, the court must remember that the propensity-nature of the evidence must be considered as a factor supporting admission.²⁵

Abuse of Discretion

Judge Cunningham abused her discretion because she ignored the standard required by MRE 403. Judge Cunningham considered only the differences of the sexual acts, the number of times the victims were assaulted or abused by Uribe, and

²¹ *Watkins*, *supra* 9, at 486-487.

²² MRE 403; *emphasis added*.

²³ *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003); *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

²⁴ *Lewis*, *supra* 23, at 199.

²⁵ *Watkins*, *supra* 9, at 496.

her own credibility assessment of JU – based solely on a single police report – to “tip the scale” in favor of Uribe.²⁶ Judge Cunningham did not weigh the propensity evidence in favor of admission, as required by *Watkins*, or consider the other *Watkins*’ factors, but instead made a determination that a mere “tipping-of-the-scale” was sufficient to exclude the MCL 768.27a-testimony under MRE 403.

Conclusion

Judge Cunningham’s exclusion of the testimony, without finding that the probative value was **substantially** outweighed by the danger of **unfair** prejudice, was an abuse of discretion.

Cunningham Conducted MRE 404(b) Analysis

Rather than consider the admissibility of the evidence under MRE 403, Judge Cunningham actually conducted an MRE 404(b)-analysis – considering admissibility using a similarity assessment to see whether the evidence supported a claim of a “scheme, plan, or system in doing an act.”²⁷

While propensity evidence is excluded under MRE 404(b), evidence that shows “similar acts” is admissible to show intent, preparation, common scheme, plan, or system in doing an act, identity, or absence of mistake or accident.²⁸ Judge Cunningham’s statement, about the purpose of MCL 768.27a, is a description of the distinctive *modus operandi* quality essential for admission of other acts evidence

²⁶ Motions Transcript, at 21.

²⁷ MRE 404(b)(1).

²⁸ MRE 404(b).

under MRE 404(b).²⁹

I think the purpose of this legislation honestly is to allow in other allegations that are more similar in nature to show a propensity; see, this is what the defendant does, this is what the defendant does.³⁰

In making her decision, Judge Cunningham relied heavily on the dissimilarity of the sexual acts, and the credibility of JU. This is consistent with an MRE 404(b) analysis as outlined in *People v Wilkins*.³¹

People v Wilkins³²

In *Wilkins*, the first two requirements for admission of evidence under MRE 404(b) are that there is “substantial evidence that the defendant actually perpetrated the bad act,” and a “relationship between the charged and uncharged offenses which supplies the link between them and assures thereby that evidence of the separate offense is probative of some fact other than the defendant’s bad character.” This link, or unique relationship, may be an “uncommon similarity of the facts and circumstances. . .”³³ In other words, as stated by Judge Cunningham, “see, this is what the defendant does, this is what the defendant does.”³⁴

Conclusion

Judge Cunningham’s analysis was to determine if Uribe’s other bad act was admissible based on the similarity of the sexual acts. This was an MRE 404(b) analysis, which Judge Cunningham labeled as a MRE 403 analysis – only

²⁹ *People v Golochowicz*, 413 Mich 298, 309-312; 319 NW2d 518 (1982).

³⁰ Motions Transcript, at 21-22.

³¹ *People v Wilkins*, 82 Mich App 260; 266 NW2d 781 (1978).

³² *People v Wilkins*, 82 Mich App 260; 266 NW2d 781 (1978).

³³ *Golochowicz*, *supra* 29, at 309-310; *citing Wilkins*, *supra* 31.

³⁴ Motions Transcript, at 21-22.

mentioning the *Watkins*' factors that supported her desired conclusion to exclude.

Such a misapplication of standard, and analysis, is an abuse of discretion because it circumvents MCL 768.27a, and this Court's mandate in *Watkins* that MRE 404(b) not be used to exclude evidence.

Conclusion

Based on Judge Cunningham's incomplete consideration of *Watkins*' factors, misapplication of standard for exclusion under MRE 403, and improper credibility assessment; she abused her discretion in excluding the testimony of JU. As a result, the Court of Appeals' decision to reverse Judge Cunningham must be AFFIRMED.

Issue II

People v Watkins clarifies that MCL 768.27a-evidence is not subject to exclusion under MRE 404(b). Judge Cunningham excluded JU's testimony based on an MRE 404(b) similarity assessment, and a credibility assessment of JU based on an initial denial of abuse. Judges Saad, Owens, and Kelly ruled that Judge Cunningham's denial was an abuse of discretion. Did the Judges err in reversing Judge Cunningham's ruling?

Prosecutor's answer: "No."

Counter-Statement of Standard of Review

A decision to admit evidence is reviewed for an abuse of discretion.³⁵ An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made."³⁶

³⁵ *Furman*, *supra* 7, at 326; *Blackston*, *supra* 7, at 480.

³⁶ *Tate*, *supra* 8, at 559; *Babcock*, *supra* 8, at 269.

Published Opinion

The Court of Appeals reviewed Judge Cunningham's ruling for an abuse of discretion. In the opinion, Judges Saad, Owens, and Kelly found that Judge Cunningham had abused her discretion in three ways.

1. It was improper for Judge Cunningham to make a credibility determination – excluding JU's testimony;
2. Judge Cunningham made an error of law when she found that JU's statements did not describe a "listed offense;" and
3. Judge Cunningham abused her discretion when she improperly applied the balancing test in MRE 403 – to excluded JU's testimony.³⁷

Credibility Determination

While Judges Saad, Owens, and Kelly note that trial-court judges may make findings of fact to make evidentiary rulings; a trial judge may not exclude a witness from testifying merely because the judge does not believe them.³⁸ The trial judge is not permitted to overstep the purview of the jury by making a credibility assessment, or determining the weight of evidence.³⁹

Judge Cunningham exceeded her scope of authority by relying on her personal credibility determination, to exclude JU's testimony. As she stated in her decision,

Watkins does not stand for the proposition that because another child makes an allegation that the court has to let it in to show propensity. The court has to at least be the gatekeeper regarding the allegation and that, **that there is a basis for the allegation**. And I think Watkins speaks to that.

³⁷ *Uribe, supra* 3.

³⁸ *Id.*, Slip op at 10-11.

³⁹ *Kanaan, supra* 19, at 618-619; *Wolfe, supra* 19, at 514-515.

The court has many concerns about the allegations as it relates to [JU]. I, I, it's concerning that there was a [sic] initial statement, **very clear nothing happened**. And even reading the statements that were done more recently -- **her statements I think are all over the place**. I don't think it is at all clear about the touching as the prosecutor indicates. I think it's more clear that **if anything happened** she's been consistent that the hand was on the belly and that the fingers maybe dropped below the belly button.

And so to be very clear, **I'm not sure that there is a basis to say that a tier three offense was committed**. And in fact if that was the only basis to grant the motion I would be inclined to do that on that basis.⁴⁰

Conclusion

It was not error for the Court of Appeals to determine that Judge Cunningham abused her discretion by deciding that “nothing happened,” based on her credibility determination of JU. Judge Cunningham simply did not believe JU, based on JU’s initial denial of abuse, and then inconsistent statements. Two qualities which are common in child-sex-abuse cases.⁴¹ As a result of Judge Cunningham not believing JU, Judge Cunningham denied the jury the ability to observe JU’s testimony, and her inevitable cross-examination, to assist them in determining the facts of the case. Judge Cunningham erred by improperly reaching beyond the scope of her authority.

JU Described a “Listed Offense”

In order to be admissible under MCL 768.27a, the other act must describe a “listed offense.”⁴² A “listed offense” is a tier I, II, or III offense.⁴³ A tier III offense

⁴⁰ Motions Transcript, at 19; *emphasis added*.

⁴¹ *Uribe, supra* 3, Slip op at 6 n 18.

⁴² MCL 768.27a.

⁴³ MCL 28.722(j).

includes a violation of MCL 750.520c(1)(a), which prohibits an adult from having “sexual contact” with a child under 13-years of age.⁴⁴ “Sexual contact”

includes the **intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts**, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose . . .⁴⁵

“Intimate parts” includes the **primary genital area**, groin, inner thigh, buttock, or breast of a human being.”⁴⁶

JU’s assault was described by her in an interview with Michigan State Police,

[JU] was laying in the bed by the wall, next to her dad, Ernesto, who was next to her step-mom. [JU] stated she was not sure what happened, but she thinks she woke up because **she felt someone touching her** and thought that was weird.

[JU] stated she knew it was her dad because he was moving whenever she felt someone touching her. She continually tried to avoid the touching, but whenever she would lay facing him, **Ernesto would touch her**. Every time she would lay facing the closet, **he would make her “touch his private.”** Every time he attempted to make her touch him, she would act like she was stretching and pull her arm back in to her body so she would not touch anything. She would then roll to face the other direction and **he would put his hand in her pants**. She did not know which way to lay because no matter what way, **he would touch her, or try to make her touch him**.

[JU] tried to lay straight, but Ernesto would still touch her in that position. . . .

I asked [JU] to explain her use of the word “**private**.” She stated, “**my down area, like my crotch. And my dad, I think his, um, penis.**” I asked her where exactly he touched, to which she replied just the top. **He was in her underwear**, too. He did not go any further than just the top, and **he kept his hand there**. I asked her where the “**top**” is. She stated **just below the underwear line and where you can see when a girl goes to the bathroom**.

⁴⁴ MCL 750.520c(1)(a).

⁴⁵ MCL 750.520a(q); *emphasis added*.

⁴⁶ MCL 750.520a(f); *emphasis added*.

At the time of the incident, [JU] said **she felt scared**, like she was in shock and couldn't move, It was constant and she wanted to tell him to stop, but didn't know if he was sleeping or not. She was confused and didn't know if her step-mom was awake. So she kept moving and tried to get in a position where he wouldn't touch her any more. She finally got too scared and was wondering what he was doing.⁴⁷

In JU's interview, she described Uribe

- Making her "touch his private,"
- Putting his hand "in her pants,"
- "[I]n her underwear," and
- Putting his hand in the "top" of the underwear, "just below the underwear line and where you can see when a girl goes to the bathroom."

Judge Cunningham's desire to find that "nothing happened," was so strong that she completely ignored that JU described "sexual contact," between Uribe and her, in which Uribe either touched her "intimate parts," or touched "the clothing covering the immediate area of [her] intimate parts."

These acts describe Criminal Sexual Conduct – Second Degree.⁴⁸ It also describes an attempt to commit a CSC-2nd, when Uribe was forcing JU to have sexual contact with his penis.⁴⁹

Conclusion

Upon review of JU's interview, and the record before Judge Cunningham, it was an abuse of discretion for her to find that a listed offense did not occur. It was not error for the Court of Appeals to find that JU described Uribe committing a "listed offense."

⁴⁷ Michigan State Police Original Incident Report No. 011-0004428-13, at 4; *emphasis added*.

⁴⁸ MCL 750.520c(1)(a).

⁴⁹ MCL 28.722(w)(vii)

Judge Cunningham Improperly Applied MRE 404(b)

As discussed above, rather than conduct an MRE 403 analysis, to determine whether the proposed MCL 768.27a-testimony was “overly sensational or needlessly cumulative;”⁵⁰ Judge Cunningham conducted an MRE 404(b) balancing test – determining that the sexual acts were not similar enough to warrant admission.

As noted by Judges Saad, Owens, and Kelly, Judge Cunningham “never considered or explained how the probative value of JU’s testimony would be outweighed by unfair prejudice under MRE 403.”⁵¹ While she said that the evidence “tip[ped] the scale towards the defendant’s issue of it being prejudicial,”⁵² she never made a determination that the testimonies’ “probative value [was] **substantially** outweighed by the danger of unfair prejudice . . .”⁵³

Conclusion

It was an abuse of discretion for Judge Cunningham to fail to explain, and apply, the proper standard of review. It was not error for the Court of Appeals to reverse Judge Cunningham, and order admission of the testimony.

Need for Clarification

In reaction to Judge Cunningham’s extreme reliance on the dissimilarity of the sexual acts, and improperly conducting an MRE 404(b) analysis, the Court of Appeals stated,

[Judge Cunningham] held the testimony to be inadmissible

⁵⁰ *Uribe, supra* 3, Slip op at 12; *citing Blackston, supra* 7, at 462.

⁵¹ *Uribe, supra* 3, Slip op at 12; *emphasis in original*.

⁵² Motions Transcript, at 19, and 21.

⁵³ MRE 403; *emphasis added*.

because it believed the molestation described by J.U. to be too “dissimilar” to the molestation described by V.G. Similarity, or lack thereof, between another criminal act and the charged crime, is a comparison courts frequently make to assess whether evidence of the other criminal act is admissible to show something other than a defendant's criminal propensity under MRE 404(b). **Whether an act is similar or dissimilar to a charged offense does not matter for the purposes of MRE 403, which, as noted, looks to whether otherwise relevant evidence is overly sensational or needlessly cumulative.** More importantly, MCL 768.27a clearly mandates the admissibility of *any evidence* of a “listed offense,” regardless of similarity. Indeed, the similarity element is presumed in the mandate to admit evidence of a listed offense.⁵⁴

Under *Watkins*, “dissimilarity between the other acts and the charged crime,” is a factor to be considered when conducting an MRE 403 analysis.⁵⁵ The error Judges Saad, Owens, and Kelly were trying to address was the circumvention of *Watkins*, and MRE 403, by Judge Cunningham – who merely re-labeled an MRE 404(b) analysis.

Judges Saad, Owens, and Kelly were also clarifying that the *Watkins*-dissimilarity factor is not limited to the specifics of the sexual act.⁵⁶ These acts do not have to be the same. As the Court of Appeals has previously held, MCL 768.27a-testimony is even permitted when the gender of the victims differ.⁵⁷

⁵⁴ *Uribe, supra* 3, Slip op at 12; *emphasis in original and added*.

⁵⁵ *Watkins, supra* 9, at 487.

⁵⁶ *Uribe, supra* 3, Slip op at 12 n 34.

⁵⁷ *People v Quick*, unpublished opinion per curiam of the Court of Appeals, issued November 27, 2012 (Docket No. 306030); Exhibit D; *application denied People v Quick*, 493 Mich 970; 829 NW2d 200 (2013); *see also People v Fathi*, unpublished opinion per curiam of the Court of Appeals, issued July 20, 2010 (Docket No. 288330), at Slip op at 7-8; Exhibit E; *application denied People v Fathi*, 492 Mich 863; 819 NW2d 889 (2012).

Conclusion

This Court should clarify that while dissimilarity is a factor to be considered in an MRE 403 analysis, under *Watkins*, the dissimilarity of the sexual act is not a bar to admission under MCL 768.27a. That is because MCL 768.27a-evidence is limited to child-sexual-abusive acts that constitute a “listed offense.” Such acts have a sufficient level of similarity that exclusion solely on that single basis would circumvent the *Watkins*-mandate that MCL 768.27a-evidence is not subject to MRE 404(b)-limitation.

Conclusion

For the reasons stated above, Judges Saad, Owens, and Kelly did not commit error in reversing Judge Cunningham, and their order to have JU’s MCL 768.27a-testimony admitted must be AFFIRMED.

Respectfully submitted,

November 20, 2015

Brent E. Morton